

STATEMENT OF THE AMERICAN CHEMISTRY COUNCIL

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE & TRANSPORTATION

SURFACE TRANSPORTATION & MERCHANT MARINE SUBCOMMITTEE

UNITED STATES SENATE

RAILROAD MERGER RULES

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## EXECUTIVE SUMMARY

Safe and efficient rail service is crucial for the member companies of the American Chemistry Council. The business of chemistry is second only to the nation's electric utilities in terms of its dependence on railroads and the size of its freight bill. Chemicals and plastics annually account for 150 million tons of rail traffic, which provides our rail service providers with \$5 billion in revenues.

The Council asked STB to make competition the centerpiece of its new merger guidelines. Unfortunately, however, STB declined to enhance competition when railroads merge. To be sure, STB invited – and perhaps, to some extent, may be said to have encouraged – railroads to “talk the talk” about competition and improved customer service when they file their next round of merger applications. But STB clearly did not adopt any rules that would require railroads to “walk the walk” by competing directly with each other at all points on their merged systems. Therefore, the Council commends to the Subcommittee's attention the following three points:

1. Ideally, the final round of rail mergers should not be reviewed by STB, which simply can't bring itself to address the needs of captive rail customers. We therefore urge you to adopt legislation, like S. 526 (already introduced by Senators Dorgan and Rockefeller), which would elevate the involvement of the U.S. Department of Justice in rail mergers. Given the extreme concentration already existing in the rail industry and the market power that railroads exert over individual captive shippers, it would certainly be appropriate to give more authority to an agency with a balanced view of competition.

2. Even if Congress chooses to leave rail merger authority with STB, that authority must be explicitly clarified to require the examination of so-called “marketing alliances” and other cooperative agreements between railroads. STB has generally not interpreted its authority to include such transactions. Because railroads, like Major League Baseball teams, are not subject to normal antitrust review, there is the risk that “de facto” rail mergers could occur without any meaningful Federal scrutiny.

3. Finally, this special hearing may well be the Senate's only chance to direct STB to reconsider its new rail merger guidelines before it is too late. Instead of issuing precise rules, which all interested parties would understand in advance of a merger, STB has left everyone wondering. Captive shippers see clearly that merging railroads will not be required to enhance competition in a future consolidation under these rules. Although STB itself recognizes that rail mergers can lead to serious service problems, the new rules do not require carriers to compensate shippers, who have suffered tremendously in the wake of four of the past five mergers. For that matter, how can short lines and rail labor unions and potentially affected communities know what will happen to them? In fact, even the Class I railroads may not be sure how STB will judge the final round of mergers, until after that round has been completed.

In conclusion, the American Chemistry Council thanks the Subcommittee for the opportunity to participate in today's hearing. Because our members depend so heavily on the railroads, we urge the Senate to provide clear pro-competitive rules in place of vague merger guidelines. We also urge you to pass legislation that would promote the long-term health of the nation's railroads – as envisioned in the Staggers Rail Act of 1980 – by allowing free-market forces to operate in a truly competitive manner.

Good afternoon Mr. Chairman and members of the Subcommittee. My name is William L. Gebo and I am Manager of Rail Services for the Dow Chemical Company. I am appearing here today on behalf of the American Chemistry Council.

The American Chemistry Council (“the Council”) represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

Safe and efficient rail service is crucial for the member companies of the American Chemistry Council. The business of chemistry is second only to the nation's electric utilities in terms of its dependence on railroads and the size of its freight bill. Chemicals and plastics annually account for 150 million tons of rail traffic, which provides our rail service providers with \$5 billion in revenues.

On behalf of Dow and the Council, it is an honor to be here today to address the subject of the new major rail merger rules that the Surface Transportation Board (“STB”) adopted on June 11, 2001. These rules [often referred to by docket number as “Ex Parte No. 582 (Sub-No. 1)” or as STB’s “Major Rail Consolidation Procedures”] will have a significant impact on the country’s economy and should be carefully reviewed by Congress.

Before commenting these rules, the Council wishes to note that earlier this year, under the chairmanship of Senator Gordon Smith, this Subcommittee undertook a series of three hearings on the condition of the rail industry. Rail customers respectfully request that, after holding this special hearing on STB’s new merger rules, the Subcommittee complete its original series of three hearings. Still to be examined in that series, and not on addressed today, are the on-going problems that rail customers face on a daily basis.

For several years – coinciding with the most recent wave of rail mergers – the Council and its member companies have become increasingly concerned about the lack of direct head-to-head competition between railroads. For the Council’s membership as a whole, 63% of all rail-served chemical plants are restricted to service by a single railroad. In other words, when it comes to rail transportation, nearly two-thirds of our industry is “captive” and therefore has no opportunity to obtain competitive price quotations or service options. Member companies that have competition available at some of their facilities report that their freight rates are much higher (ranging from 15% to 60% more)

where the railroad has a monopoly over the shipper's traffic. Nor is it surprising that the Council's members report that railroads are less responsive to customer service concerns at locations without rail-to-rail competition.

This lack of competition is not acceptable for the business of chemistry, which is obligated to supply customers in virtually every sector of the U.S. economy – including motor vehicles, pharmaceuticals, computers, packaging, agriculture, and water treatment. Moreover, as I have noted, the business of chemistry is the nation's largest exporting industry, with more than \$80 billion in exports last year. So the business of chemistry must also rely on railroads to reach customers in Canada and Mexico and to move products efficiently to various ports.

Having underscored the importance of rail service to the business of chemistry, I will now focus on the specific topic of today's hearing – rail mergers. Throughout the recent 15-month moratorium, the Council took part in every phase of STB's rail merger policy review. Our industry took those STB proceedings very seriously. But we are extremely disappointed with the outcome. STB had the opportunity to establish clear rules for the next round of rail mergers. And make no mistake, now that there are only two Class I railroads in the East and two in the West, the next round of mergers will be the last round. The Council believes that within a few years there will be only two major railroads in North America. Obviously, with our members already subject to monopoly conditions at almost two-thirds of their rail-dependent facilities, we are worried that there will be even more concentration and even fewer alternatives for captive shippers.

In the rulemaking docket, the Council asked STB to make competition the centerpiece of its new merger guidelines. Unfortunately, however, STB declined to enhance competition when railroads merge. To be sure, STB invited – and perhaps, to some extent, may be said to have encouraged – railroads to “talk the talk” about competition and improved customer service when they file their next round of merger applications. But STB clearly did not adopt any rules that would require railroads to “walk the walk” by competing directly with each other at all points on their merged systems.

The American Chemistry Council commends to the Subcommittee's careful attention the following three points about the current status of Federal rail merger policy:

1. Ideally, the final round of rail mergers should not be reviewed by STB, which simply can't bring itself to address the needs of captive rail customers. We therefore urge you to adopt legislation, like S. 526 (already introduced by Senators Dorgan and Rockefeller), which would elevate the involvement of the U.S. Department of Justice in rail mergers. Given the extreme concentration already existing in the rail industry and the market power that railroads exert over individual captive shippers, it would certainly be appropriate to give more authority to an agency with a balanced view of competition.

2. Even if Congress chooses to leave rail merger authority with STB, that authority must be explicitly clarified to require the examination of so-called “marketing alliances” and other cooperative agreements between railroads. STB has generally not interpreted its authority to include such transactions. Because railroads, like Major League Baseball teams, are not subject to normal antitrust review, there is the risk that “de facto” rail mergers could occur without any meaningful Federal scrutiny.
3. Finally, this special hearing may well be the Senate’s only chance to direct STB to reconsider its new rail merger guidelines before it is too late. Instead of issuing precise rules, which all interested parties would understand in advance of a merger, STB has left everyone wondering. Captive shippers see clearly that merging railroads will not be required to enhance competition in a future consolidation under these rules. Although STB itself recognizes that rail mergers can lead to serious service problems, the new rules do not require carriers to compensate shippers, who have suffered tremendously in the wake of four of the past five mergers. For that matter, how can short lines and rail labor unions and potentially affected communities know what will happen to them? In fact, even the Class I railroads may not be sure how STB will judge the final round of mergers, until after that round has been completed.

In conclusion, the American Chemistry Council thanks the Subcommittee for the opportunity to participate in today’s hearing. Because our members depend so heavily on the railroads, we urge the Senate to provide clear pro-competitive rules in place of vague merger guidelines. We also urge you to pass legislation that would promote the long-term health of the nation’s railroads – as envisioned in the Staggers Rail Act of 1980 – by allowing free-market forces to operate in a truly competitive manner.

Thank you.